

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN BRADLEY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
MARTIN L. DRAGOVICH, ET AL.	:	NO. 97-7660

M E M O R A N D U M

Padova, J.

March , 1998

Petitioner, John Bradley, a state prisoner at the Mahanoy State Correctional Institute at Frackville, Pennsylvania, filed a pro se Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C.A. § 2254 (West 1994).¹ In accordance with 28 U.S.C.A. § 636(b)(1)(B) (West 1993) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Peter B. Scuderi for a Report and Recommendation ("Report"). Magistrate Judge Scuderi recommended that the Court dismiss the Petition, and Petitioner filed objections. For the following reasons, I will overrule Petitioner's objections, adopt the Magistrate Judge's Report, and dismiss the Petition.

¹ As an initial matter, Petitioner objects to the Magistrate's consideration of his petition for writ of habeas corpus pursuant to 28 U.S.C.A. § 2254, as a petition under 28 U.S.C.A. § 2241. Because Petitioner challenges the actions of the Pennsylvania Board of Probation and Parole and not his judgment of conviction, the Court agrees with the Magistrate's consideration of the petition pursuant to 28 U.S.C.A. § 2241. See generally Bennett v. Soto, 850 F.2d 161, 162 (3d Cir. 1988).

I. FACTS AND PROCEDURAL HISTORY

On April 9, 1996, Petitioner pled nolo contendere to a charge of involuntary manslaughter in the Court of Common Pleas of Delaware County. (Petition at 4.) He was sentenced to two and one half to five years imprisonment by the Honorable Robert Wright. (Id.) Upon expiration of his minimum sentence, he became eligible for parole. The Pennsylvania Board of Probation and Parole ("PBPP") reviewed Petitioner's file and denied his application for parole based on a series of factors. Petitioner filed the instant Petition on December 16, 1997. In his Petition, Petitioner claims that the Board's failure to release him on parole violated his federal constitutional right to due process. Specifically, Petitioner claims that his constitutional rights were violated when:

1. He was deprived of access to the state courts to challenge the unfavorable decision of the PBPP by a recent Pennsylvania court decision which eliminated any avenue for appellate review of the PBPP's denial of parole.
2. The PBPP failed to parole him upon the expiration of his minimum sentence despite his plea agreement, which stipulated a two and one half year minimum sentence.
3. The PBPP relied on an "unfavorable recommendation" by the Department of Corrections ("DOC") to deny him parole.
4. The PBPP violated his right to due process by "using the generally worded statutes" while "ignoring specific statutes" that limit the range of discretion . . . to

resentence petitioner past the court imposed 'definite minimum term' without due cause."²

(Petition at 7-8.)

By Order dated December 19, 1997, the Court referred the Petition to Magistrate Judge Scuderi for a Report and Recommendation. Magistrate Judge Scuderi filed his Report recommending that Bradley's Petition be denied on February 3, 1998. Bradley filed Objections to the Report on February 13, 1998.

II. STANDARD OF REVIEW

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in

² In the Report, Magistrate Judge Scuderi addressed each of these arguments. The Court herein will address only those findings and conclusions to which Petitioner specifically objects.

part, the findings or recommendations made by the magistrate."
28 U.S.C.A. § 636(b) (West 1993).

III. DISCUSSION

1. Procedural Due Process

Petitioner objects to the Magistrate Judge's conclusion that neither the Constitution nor Pennsylvania law creates a legitimate claim of entitlement to parole prior to the expiration of a valid sentence of imprisonment. Specifically, Petitioner contends that in the Report, by relying on §§ 9756(a) and (b) without mention of § 9756(c), Magistrate Judge Scuderi ignored the "lynchpin" of his "allegations of right to parole," because § 9756(a) and (b) merely "create[] the system under which prisoners in Pennsylvania have been sentenced since 1975," whereas § 9756(c) creates a right to a grant of parole upon reaching the parole eligibility date. (Pet.'s Objs. at 2.)³

³ Title 42 Pa. Cons. Stat. Ann. § 9756 states, in pertinent part:

(a) General rule.--in imposing sentence of total confinement the court shall at the time of sentencing specify any maximum period up to the limit authorized by law and whether the sentence shall commence in a correctional or other appropriate institution.

(b) Minimum sentence.--The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.

(c) Prohibition of parole.--Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:

(1) a summary offense is charged;

Petitioner's objection is without merit. In order to establish that the state has violated an individual's right to procedural due process, a plaintiff must (1) demonstrate the existence of a protected interest in life, liberty or property that has been interfered with by the state, and (2) establish that the procedures attendant upon that deprivation were constitutionally insufficient. See Board of Regents v. Roth, 408 U.S. 564, 571 (1972). The Magistrate Judge correctly concluded that:

Under Pennsylvania law, the significance of the minimum sentence is that it establishes a parole eligibility date. A prisoner has a right only to apply for parole at the expiration of his or her minimum term and [to] have that application considered by the Board.

(Report at 7 (internal quotations omitted) (citing Krantz v. Pennsylvania Board of Probation and Parole, 483 A.2d 1044, 1047 (Pa. Cmwlth. 1984) (holding that a parole eligibility date, usually set at the expiration of the prisoner's minimum sentence, does not vest any right to a grant of parole upon reaching that date); Gundy v. Pennsylvania Board of Probation and Parole, 478 A.2d 139, 141 (Pa. Cmwlth. 1984).) Federal courts in this

(2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
(3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

district as well as Pennsylvania state courts have held that parole is not a constitutionally protected liberty interest under Pennsylvania law. Rodgers v. Parole Agent SCI-Frackville, 916 F.Supp. 474, 476-77 (E.D.Pa. 1996) (holding that neither the 14th Amendment nor Pennsylvania law creates a liberty interest in parole); Tubbs v. Pennsylvania Bd. of Probation and Parole, 152 Pa. Commw. 627, 630, 620 A.2d 584, 587 (1993) ("it is well settled under Pennsylvania law that a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his sentenced maximum term").

Thus, upon completion of Petitioner's minimum sentence, the PBPP had the authority to decide to release Petitioner on parole. However, at that point, Petitioner did not have a vested constitutional right to parole sufficient to trigger procedural safeguards. See Jubilee v. Horn, 959 F.Supp. 276 (E.D.Pa. 1997) (holding that Pennsylvania inmates have no liberty interest or entitlement to parole that must be protected with procedural safeguards). The inclusion of Title 42 Pa. C.S.A. § 9756(c) in the analysis does not change the result; § 9756(c) merely prohibits parole in circumstances not relevant to this case. Contrary to Plaintiff's assertion, no liberty interest in parole release upon expiration of the minimum term of incarceration can be inferred from this section. Accordingly, the PBPP's decision

not to release Petitioner does not constitute a violation of Petitioner's procedural due process rights.

2. Substantive Due Process

Petitioner also objects to what he terms the "the arbitrary and capricious rational[e] in the decision making process of the PBPP and the DOC by the use of imperm[i]ssible factors used in the denial of parole." (Pet.'s Objs. at 3.) Specifically, Petitioner contends that in making its decision to deny Petitioner early release, the PBPP impermissibly considered a recommendation from the DOC that contained information regarding his criminal history.

Under Pennsylvania law,

in granting paroles the [PBPP] shall consider the nature and character of the offense committed, any recommendation made by the trial judge, the general character and history of the prisoner and the written personal statement or testimony of the victim or the victim's family... The [PBPP] shall, in all cases, consider the recommendations of the trial judge and of the district attorney and of each warden or superintendent, as the case may be, who has had charge of an applicant, each of whom is directed to submit to the [PBPP] his recommendation and the reasons therefor, with respect to each parole application.

61 Pa. Cons. Stat. Ann. § 331.19 (West, WESTLAW through 1997 Act 50).⁴ The PBPP has the authority "to release on parole any

⁴ Petitioner relies on a variety of sections from "House Bill #1728" in support of his argument that the PBPP does not have discretion to consider criminal history in making a parole determination. (Pet.'s Objs. at 5-6.) However, as enacted, the

convict . . . whenever in its opinion the best interest of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." 61 Pa. Cons. Stat. Ann. § 331.21 (emphasis added).

When presented with such a discretionary scheme, the role of judicial review "is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. In Burkett v. Love, 89 F.3d 135 (1996), the United States Court of Appeals for the Third Circuit ("Third Circuit") explained that even though a Pennsylvania prisoner has no protectable liberty interest in parole, "[a] legislative grant of discretion does not amount to a license for arbitrary behavior." Id. at 139 (quoting Block, 631 F.2d at 236). The exercise of discretion is limited by the prisoner's substantive due process rights. As the Supreme Court has stated:

For at least a quarter of a century the Court has made clear that even though a person has no right to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Perry v. Sinderman, 408 U.S. 593, 597 (1972) (internal quotations omitted). Accordingly, as the Report indicates, "a state cannot

relevant statute does not contain the language referenced in said "House Bill." See 61 Pa. Cons. Stat. Ann. §§ 331.19, 331.21.

permit arbitrary denials of parole based on impermissible criteria such as race, political beliefs, religion, or totally frivolous criteria with no rational relationship to the purpose of parole such as the color of one's eyes, the school one attended, or the style of one's clothing." (Report at 10 (citations omitted).)

The Court finds that the PBPP did not abuse its discretion when it considered the DOC's recommendation, which Petitioner claims included his criminal history, in making its parole decision. The parole statute itself defines the limits of the PBPP's discretion. The statute specifically directs the PBPP to consider factors such as recommendations from the "warden or superintendent as the case may be," and the prisoner's "general character and history." 61 Pa. Cons. Stat. Ann. § 331.19. Based on the facts alleged in the Petition itself, it appears that in denying Petitioner parole, the PBPP clearly followed the statute's mandate and stayed within the bounds of its discretion. In conjunction with other factors, the PBPP consulted a recommendation by the DOC, and decided, in its opinion, that parole was not appropriate for this Petitioner, at this time. The statute invests the PBPP with just this type of discretion. Therefore, the Court finds that in denying Petitioner parole, the PBPP did not abuse its discretion by considering the DOC's recommendation and Petitioner's criminal history therein, and

thus Petitioner's substantive due process rights were not violated.

IV. Certificate of Appealability

In the event the Court does not agree with his Objections, Petitioner requests that he be granted leave to appeal the Court's decision to the Third Circuit.

Under 28 U.S.C.A. § 2253(c)(1)(A), to appeal a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, a defendant must first obtain a certificate of appealability from a district or circuit court judge. The Third Circuit recently held that Section 2253(c)(1) authorizes a district judge to issue a certificate of appealability. United States v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997). The certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," and the showing must be made for each issue for which the certificate is sought. 28 U.S.C.A. § 2253(c)(2), (3)(West Supp. 1997). Because, as discussed above, Petitioner has failed to make a substantial showing of the denial of a constitutional right, the Court will not grant him leave to appeal this decision to the Third Circuit.

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O R D E R

AND NOW, this day of March, 1998, upon consideration of the Report and Recommendation of Magistrate Judge Scuderi that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be Dismissed (Doc. No. 3) and Petitioner's Objections thereto (Doc. No. 4), **IT IS HEREBY ORDERED THAT:**

1. Petitioner's Objections are **OVERRULED**.
2. The Report and Recommendation **SHALL BE ADOPTED**.
3. Petitioner's Petition for a Writ of Habeas Corpus (Doc. No. 1) is **DISMISSED**.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

JOHN R. PADOVA, J.